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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 673.

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE,
Petitioner,

vs.

GREYVAN LINES, INC.

BRIEF FOR PLAINTIFF-APPELLEE OPPOSING PETITION FOR WRIT OF CERTIORARI.

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Greyvan Lines, Inc., submits this brief in opposition to the petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. The opinion of that court is reported 156 F. (2d), 412. Emphasis is ours unless otherwise noted.

STATEMENT OF THE CASE.

The case is as well stated in the "Findings of Facts" (R., 219) as we could possibly restate it; especially with regard to the method of operation of the company's business (R., 219 et seq.) and the method of arriving at the arbitrary assessments. (R., 223, 226.)

During the times involved in the assessment period (January, 1937, through first quarter of 1942 (R., 220)) plaintiff was an "employer" within the meaning of the Social Security Acts of Congress and duly paid assessments levied on all of its employees. The amended and supplemental returns (enforced returns) (R., 28-62) are with respect to its "truckmen" who operated on an independent contractors system (R., 139), whose names are specified (R., 45-93) and of certain persons employed by such truckmen, whose names were unascertainable (R., 137) but are lumped in the enforced returns under the word "Dummy". (R., 62.)

QUESTIONS PRESENTED.

1. Question 1 is well stated, but question 2 is not accurately stated. (Pet., p. 2.)

The entire case hinges upon the point as to whether or not the **"truckmen"** were **"employed"** by plaintiff for a **"wage"** within the meaning of the Social Security Acts which provide that there shall be "levied, collected and paid upon the income of every **individual** a tax equal to the following percentages of the **wages** received by him . . . with respect to **employment**." (See Government's Appendix, p. 14.)

The simple point involved in the case and decided correctly by the District Court is: There was no employment involved, no wages were paid, and the act had no application whatsoever. The question of "control" so vigorously discussed in the Government's petition (p. 10) has no application to the case. (Findings, R., 226, 227.)

As we see it, the issue is simple and the case can be disposed of on the findings of fact (R., 219) of the District Court. Section 52 (a) of the Federal Rules of Procedure provides:

> "Findings of fact shall not be set aside unless **clearly erroneous** and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> **American Ins. Co. v. Scheufler**, 129 F. (2d), 143.

Judgments may be reversed only for errors affecting substantial rights of the party.

U. S. Code, Title 28, Sec. 391.

Findings of fact may not be interfered with when based on substantial evidence.

Bereth v. Sparks, 51 F. (2d), 441;
Gary Theatre Corp. v. Col. Picture Corp., 120 F. (2d), 881.

Under the established rule, this court accepts the findings in which two courts concur, **unless clear error is shown.**

Pick Manufacturing Co. v. General Motors Corp., 299 U. S., 3, 81 L. Ed., 4;
United States v. Commercial Credit Co., 286 U. S., 63, 76 L. Ed., 978.

ARGUMENT.

Relationship of Employer and Employee Did Not Exist.

We submit that the evidence in this case fully established the following propositions and warranted the District Court in rendering judgment for the plaintiff.

(1) Greyvan was not an employer of the persons with respect to whom the additional tax was assessed;

(2) The contract truckmen were not in the employ of Greyvan;

(3) Greyvan paid the contract truckmen **no wage**; but did pay the contract truckmen a prearranged, entire and indivisible payment for a completed transportation service; the contract truckmen furnishing the motor vehicle and equipment, costing when new approximately $5,000.00, paying the entire expense of the investment and the expense of maintenance and operation, and hiring, paying, and discharging the necessary labor to operate the motor vehicle equipment and the loading and unloading thereof;

(4) Independent contractors are not taxed; and no statutory authority is provided whereby the collector is authorized to renegotiate for the parties an entirely new and different contract and to segregate from the entire and indivisible payments made to the truckmen for the completed transportation service so contracted for, any portion (be it correct or incorrect) and to "judicially determine" such segregated portion to be "wages."

The Contract Truckmen Arrangement.

The evidence has shown performance of the independent contract. The relationship created was contractual and does not arise from tort.

The contract truckman provides all of the equipment, together with necessary pads, etc., required in the transportation which he undertakes. The truckman is obliged to hire (and fires) any assistants required in the transportation, loading, unloading and delivery of shipments, and such employees are under his sole direction and control. He furnishes, at his own expense, all packing and crating materials; public liability and property damage insurance upon his motor trucks, which insurance must cover jointly the liability of the company and the truckman "as their respective interests may appear"; provides a fidelity bond covering himself and his substitute drivers in the penalty of $1000.00 to cover any default in accounting for freight charges collected; must make a cash deposit of $250.00 with the company to secure payment of damage claims for which he is liable and payment of amounts charged to his account on his direction and order, including gasoline purchased on credit cards; must account to the company for the cost of any or all loss or damage to the goods, wares or merchandise occurring while the same are in his custody, possession or control, other than such as are covered by cargo insurance provided by Greyvan. The company may charge to his account any loss, damage or expense which it may sustain because of his acts, and he agrees to indemnify the company therefrom; he agrees to keep his motor equip-

ment in good mechanical and proper operating condition at all times, and to keep it clean. He pays the cost of operation of said motor equipment, including property taxes, resident vehicle license, oil, fuel, tires, repairs, and all other costs incident to his ownership or operation; agrees to comply with all federal and state laws and regulations and the ordinances of each and every city, village and municipality where the trucks may be operated, and the rules and regulations of any governmental agencies having jurisdiction over the highway, including licensing, speed, etc., laws. He pays his own fines for any violation of laws for which he is responsible.

Agreement Is Indivisible.

The agreement is indivisible. While it necessarily requires his personal service or that of an authorized substitute, in order to perform the agreement, yet no specific sum is set apart for his labor in connection therewith. A truckman who has business ability can make far more in the performance of this contract than he could if he were employed on a wage under a contract of hire. The truckmen engaged by this company do make more than their employees under contract of hire make. He makes a profit, the same as if the independent contractor were engaged in the execution of an independent contract for the construction of a house. If a contractor in the building of a house is a good manager, he will have a profit above and beyond his own labor; if he is a poor manager, he may lose money and realize nothing for his personal service involved. So with the "truckman" under this contract.

History and Reasons for the Independent Contract.

This company was using independent contractors in the transportation business long prior to the enactment of the Federal Motor Carrier Act and the Social Security Acts.

The company was organized in 1929 and independent contracts were executed by it as early as the year 1930. Singularly enough, the main reason for the adoption of the system of independent contractors was the lack of control which the company was able to exercise over an employee because of distance traveled. Hence, there was developed a system whereby the transportation could be contracted to responsible owners of equipment and the results accomplished by contract rather than by unsupervised employment.

Labor is necessary (1) in loading and unloading the goods into and out of the truck; and (2) in driving the truck from point of origin to destination. Under the system developed the independent contractor has the option of performing this labor himself or of employing others to do it. Wherever the goods may be loaded, or unloaded, he may, if he desires, employ labor at that point for that purpose and he may only supervise and direct the loading or unloading; or, he may do part and hire the rest. The option is his. He may drive the truck himself; or he may hire someone to do it.

The company found that an independent contractor, who owned his own equipment, gave it better attention, kept it in repair, and performance was often superior to that of its employees. Consequently, it further devel-

oped a system whereby the independent contractors were rewarded for greater efficiency in performance by the payment of bonuses. The independent contractor had an opportunity to better himself far beyond what he could accomplish as an employee, and in bettering himself he promotes the interests of the company. An independent contractor, owning his own equipment, is interested in maintaining that equipment at its highest degree of excellence. Further, the more he does, the more his income. By engaging a driver, he can keep his truck moving during all the time permissible under regulations. He has no interest to dilly dally on the job since an idle truck makes him nothing, whereas an employee, in operation of company equipment, may have the opposite inclination.

Greyvan Lines, Inc., has no localized operation. It maintains no garages or terminals at any location. It operates from the homes of its customers and warehouses throughout the country, from whence it receives goods for transportation, or to which it makes delivery. Its operations cover thirty-eight states and the District of Columbia. The company may, for example, occasionally have a load for transportation from the vicinity of New York to El Paso or other far away points; and frequently loads from Kansas City, Minneapolis and Chicago to Miami, Tampa and other southern points; and loads originating en route may take the truckman to points far distant from the point of origin. The requirements of the transportation may take the equipment into territory which may be sparsely populated, and where the com-

pany cannot, under any circumstances, maintain equipment and personnel sufficient to supervise operations by its own employees.

The moving of household goods differs from the transportation of ordinary freight. In the former, the truckmen come into direct contact with the family; must please the housewife in every particular and be a diplomat in general. In fact, the moving of household goods is practically a custom service. The company cannot control the need or demand for such service, nor can it control the origin or destination of such shipments. They must take the business where and when it is available. The company is obliged to so manage the business as to have motor vehicle equipment available to meet the shipper's demand. Consequently, any one piece of motor vehicle equipment may be dispatched on irregular routes and on schedules most suiting the convenience of the shippers, to any part of the 38 states served by the company. And so, it is not uncommon or infrequent that any one piece of motor vehicle equipment may be away from Chicago or points of origin two, three or four months.

It is, therefore, impossible for the company to exercise supervision over the details of performance, the method and manner of performance, or the "physical conduct" of the driver of the motor vehicle equipment.

It is impossible to determine, with accuracy, the cost of operating equipment from one distant point to another under varying road conditions, climatic conditions, terraine, etc., if operated by an employee, particularly when the equipment may be on the highways without return-

ing to base, for weeks at a time. When the owner is personally in charge of the equipment, it is his loss when not operated economically and up to its full capacity.

Efficiency in loading is important. Unless efficiently loaded, neither the independent contractor or the company realizes maximum income from the transportation. The system of independent contracts in force encourages maximum use of available space and efficient loading and unloading.

The incentive to a man engaged in his own business to make a profit from the operation of his own equipment, creates in him a desire for excellence in performance. This indicates the necessity for and the advisability of, the company operating under the system of independent contractors wherever it can.

The truckman may choose his own routes. He is not obliged to follow any particular route. He may depart from the shortest possible route if he desires, the excess cost being his to bear. In Pennsylvania, he may take the new super highway, paying the added cost of $7.50 for the use of it, or he may take the public highway. The option and the expense is his. **No control of the method and manner of operation of equipment is, or can be, exercised. These truckmen therefore are in a business of their own and not in any employment for Greyvan Lines, Inc.** (R., p. 226, par. 24), **Mutual Trucking Co. v. U. S.,** 51 F. Supp., 114, aff'd 51 F. (2d), 655.

THE GOVERNMENT'S STATEMENT.

Many of the statements contained on pp. 3 to 9 of the Government's petition are not accurate. For instance (R., 141), Government counsel cut off the witness without permitting him to state the character of the bulletins issued. The labor contracts were separate, there being different contracts applying to (1) employees and (2), truckmen. (R., 174.) For some reason the Government did not print these contracts in the transcript, but they will be found with the original papers. This court has held that membership in a Union is consistent with the independent contractor relationship. **American Federation of Labor v. Swing, et al.**, 312 U. S., 321, 85 L. Ed., 855. The requirement as to truckmen belonging to a Labor Union was not a requirement created, or voluntarily imposed upon plaintiff. Many of the regulations referred to (Pet., p. 6) revolved about the requirement imposed by the regulations of the Interstate Commerce Commission promulgated under the Motor Carrier Act, all as found by the District Court. (R., pp. 225, 226, paragraphs 21 and 24.)

The evidence as discussed by the Circuit Court of Appeals will demonstrate to the court that the regulations set forth in the manual were never adhered to or enforced, and as the Circuit Court of Appeals say: "We agree with the appellee that there was evidence to justify the court's disregard of" the manual. (R., 257.)

Statements contained in petition (p. 7) are taken from the manual and not from the evidence and consideration of the manual has been removed from the case by the

findings of the District Court, fully concurred in by the Circuit Court of Appeals.

Reference to the proceedings before the Interstate Commerce Commission (Pet., p. 8) are not accurately stated and, as the Circuit Court of Appeals said, the Government's contention is not borne out. (R., 257-8.) The company's operation was fully warranted. Otherwise a certificate would not have been granted by the Interstate Commerce Commission.

U. S. v. Rosenbloom Truck Lines, 315 U. S., 50; **Thompson v. U. S.**, 321 U. S., 19.

With reference to the "breaking down of payments" (Pet., p. 8), the answer of the Circuit Court of Appeals is quite conclusive:

> "The breaking down of the payments to the truckmen to differentiate between wages and profits from the use of their equipment appears to us to be equally arbitrary.
>
> We agree with the District Court that the relationship of employer and employee did not exist between the company and the truckmen or their helpers. We find no error in the findings challenged by appellant." (R., 259.)

ANSWER TO GOVERNMENT'S PETITION.

(1). Answering the first alleged specification of errors to be urged (Pet., p. 9), the uncontradicted evidence showed the existence of an independent contractor relationship, not taxable under the statute, as evidenced by the findings of fact. (Pars. 12 to 17, R., 222-4.) The findings of fact (Par. 24, p. 226) rested upon a safe foundation and the conclusions of law were irrefutable. (R., 227.)

The second alleged specification to the effect that the Court of Appeals failed to look to the purposes of the Social Security Act is likewise without foundation. There was no room for the Circuit Court of Appeals or the District Court to "consider the economic facts of the relationship between the parties" as the statute (Government's Appendix, p. 14 et seq.) specified the only persons subject to the tax and there is no room to read into that statute any "economic condition" when Congress did not. The history of the acts, as hereinafter referred to, dispels any idea that independent contractors were subject to the tax.

As to the third alleged specification (Pet., p. 10), the act itself likewise dispels any notion that any test other than that specified in the act is to be taken into consideration. As pointed out above, the question is whether the truckmen were employed by plaintiff **for a wage**, upon which **wage** there could be levied, collected and paid a tax equal to the percentage of the **wages** received by the individual with respect to employment.

Here the evidence purely and clearly dispels the employment of the individual upon a wage and there is no room for the application of the act as held by both the Circuit Court of Appeals and the District Court.

In the fourth alleged specification with respect to the commissioner's assessments being arbitrary, if the record in this case does not show that the assessments were made arbitrarily, without support of fact, and in an arbitrary manner, we submit that it is impossible to find an assessment that was arbitrarily made.

Assessments Were Arbitrarily Made.

Greyvan's agreement with the truckmen was indivisible. That agreement was to pay a stated amount for the completed transportation which the contract truckman undertook to consummate. **Commercial Motor Freight, Inc., v. Ebright**, 143 O. S., 127, 54 N. E. (2d), 297, 151 A. L. R., 1321. Amounts to which the truckman, as an independent contractor, was entitled on each particular haul were determined in advance from the schedule attached to the contract. There was no amount specified for wages and no amount specified for the use of the equipment, expenses, investment, maintenance or profit. The collector could not divide anything which the parties themselves did not attempt to divide and which cannot, in the nature of the thing, be divided. He could not renegotiate the contract between the truckmen and Greyvan, nor could he substitute one of his own making in place thereof.

No wages were paid to the truckman; nor were any one of the employees or the contract truckmen on the payroll of Greyvan. The contract truckman was the paymaster of the persons whom he hired, controlled while in his employ, and fired at the conclusion of the employment, or sooner, if he desired.

How the collector can justify an attempt to break down this contract and segregate a "wage" on which to apply the percentage of tax specified in the statute, we cannot comprehend. Such action was arbitrary, unjustified and unlawful.

The stipulation (R., 25, par. 8) shows the method and the manner of arriving at the computations made by the collector. He forced a "payroll" for Greyvan in the manner therein stipulated. Exhibit G (R., 45-62) shows the manner in which it was done. Under the column "Name of Employee" on each page of this exhibit (except the final sheet), the contract truckman's name was written therein. The three months period for which the assessment is made is indicated in the proper column. Under the column "Amount of Wages Actually Reported on Return" is found the word "none." Under the column "Correct Amount of Wages" is inserted the amount arrived at by the artificial means of producing a pay roll. Attention is called particularly to the first column "Employees Account No." The word "unknown" appears throughout the whole series of the enforced supplemental returns.

Attention is called to the last sheet of Exhibit G (R., 62), where, under the column "Name of Employer" there

is extended the word "Dummy." These covered helpers who were employed and paid by the various truckmen themselves, and whose estimated wages were arbitrarily arrived at in the manner set forth in paragraphs 8(b) (R., 26) of the stipulation. The names of such persons were entirely unknown to Greyvan. They had no records from which the identity of such persons could be ascertained. (R., 62, 137.) No consideration was given to such portion of that labor as was furnished by warehouses throughout the country and upon whose wages, it must be presumed, social security taxes were paid by the owners of such warehouses and the employers of such labor, as required by the law.

That the action of the Government was not only arbitrary, but inconsistent, is also demonstrated by the fact that certain of the truckmen were employers, had employers' numbers, and paid the social security taxes with respect to their own employees.

Counsel for the Government claim (Pet., p. 12) that Treasurer Shearer agreed to the "allocation." Without questioning whether such an agreement would be beyond his authority, or supported by a consideration, no such agreement was made. Such an agreement was expressly denied by Shearer (R., 141) and the Government put on no witness to prove the contrary. The effect of the testimony was, that if the plaintiff was liable for the tax, the amount was not controverted. The court sustained our objection to the question as to whether there was "controversy about the amount of wages." (R., 141.) Furthermore, we introduced no evidence as to the cor-

rectness or incorrectness of the computations but content ourselves on the proposition that there was no wage paid, and there is no tax payable because the truckmen were not employees within the meaning of the Social Security Act. Why the Government insists upon it we cannot understand, because, if there is a liability for the tax such liability exists irrespective of any agreement with Treasurer Shearer.

The False Issue of Control.

In further answer to the petition for the writ under the heading "Reasons for Granting the Writ" (Pet., p. 10), we are not conversant with the record in **United States v. Silk.** (Pet., p. 10.)

The Government here, as in the courts below, has failed to draw a proper line of demarcation between co-operation and control.

Further, the factual question is resolved against the Government by paragraph 24 of the findings of fact. (R., p. 226.)

Neither the common law rule as applied in tort cases or elsewhere has application. The statute furnishes the sole test with reference to who is or who is not taxable. It does not depend upon whether one exercises control; therefore, the Circuit Court of Appeals and the District Court were correct in holding that the evidence as a whole conclusively showed the existence of the independent contract relationship and the payment of no wage which took the case without the statute.

It is well recognized that a measure of control does not affect the independent contractor relationship when such supervision is inherent in any joint undertaking.

Radio City Music Hall Corp. v. U. S., 135 F. (2d), 715, 718;

Los Angeles Athletic Club v. U. S., 54 F. Supp., 702, 706;

Schatz Pollock Woolen Co. v. Murphy, Director, 348 Ill., 218, 51 N. E. (2d), 147.

The definitions of who are subject to the Fair Labor Standards Act are not to be found within the Social Security Acts or any of the acts quoted or referred to in the appendix. Consequently **Walling v. Rutherford Food Corp**, 156 F. (2d), 513, **National Labor Relations Board v. Hearst Publications**, 322 U. S., 111, and other cases of the same character have no application here.

Under the third reason assigned (Pet., p. 12), the Government would require this defendant to defer collection of its judgment and go to the expense of defending a case in this court for academic reasons alone. We deny that the evidence showed that Treasurer Shearer made any agreement with respect to the basis of determining the amount of the tax or had any authority to make such an alleged agreement. There was no wage upon which to make any assessment and there was no evidence available to the commissioner upon which to base an assessment. The commissioner fixed his own basis for computing a wage where none in fact existed.

The illegal and arbitrary character of the assessment is well shown in the findings, paragraphs 9 to 11, inclusive. (R., p. 222.) These findings were based on the stipulation. (R., 24-26.)

The Manual for Truckmen.

The main hold of the Government is on the "Manual for Truckmen" introduced in evidence as the Government's Exhibit 1. The argument is entirely beside the point since there was no employment, no wages, and consequently could be no tax. (**Williams v. U. S.**, 126 Fed.. (2d), 129.)

The District Court disregarded the exhibit because the evidence showed that the manual, while prepared and distributed, was never enforced or relied upon except for the information which it contained to a new truckman starting in the business. (R., 104, 150, 154 and 171.)

In the first instance, the period involved is from January, 1937, through the first three months of 1942. The manual was not distributed until April 20, 1940, so that it can have no effect whatsoever upon that part of the assessment preceding April 20, 1940.

Secondly, the independent contracts date back to 1929, long prior to the enactment of the social security legislation. As established by the evidence, operators of this equipment traveled far and were away from Chicago and the offices of the company and under no supervision whatever for weeks and even months at a time. It was impossible for the company to supervise the details of their operations, which character of supervision goes hand in hand with an employer-employee relationship. Growing out of early lessons, the company found it advisable to obtain the services of a business man (not a mere menial servant) who had sufficient business capacity to properly handle the customers of Greyvan, who by means of a large investment and solicitation of business throughout

the 38 states served, it had been able to procure. (R., 119, 162, 163.) A large majority of its customers were householders, mainly women, who had pride of ownership in the household goods to be moved and many of whom were extremely hard to please. The business is different from a general trucking business where commercial establishments call when there is property to be transported; the business is scattered as people seldom move from city to city. (R., 136.)

On company operated equipment, employees occasionally failed to keep the vans moving, were reckless in handling the company equipment, unnecessarily damaged the shippers' goods, adding expense, for which and other reasons it was decided imperative to secure persons who owned and operated their own equipment, even though it became necessary to divide with them a larger share of the profits than would have been necessary under an employment relationship. (R., 175-177, 102.) The truckman was an employer and in business for himself. (R., 127.)

Thus the independent contract relationship came into existence and would have been used 100 per cent during the time involved if conditions had permitted. (R., 177.)

With this history in mind what became of the manual? The three former employees who prepared the manual overlooked the impossibility of enforcing the provisions of the manual. Being impossible of enforcement, the company as to the owner-operators never endeavored to enforce it. (R., 171.) The truckmen and dispatcher paid no attention to the manual. (Bossert, R., 104; Prante, R., 150, 151.) Provisions with reference to uniforms were not enforced. (R., 103, 113, 171, 179.)

A single former truckman, one Joe Garrison, out of the 50 to 60 truckmen involved, was produced. He had been a failure and voluntarily quit. His understanding with reference to the manual were assumptions of his own, not any instructions that he received from any of the officials of the company, and the assumptions were stricken. (R., 185, 186.) He remembered no conversation with any company official in connection with the manual. (R., 186.)

Even the witness, Garrison, supported the company in most of his testimony. Five truckmen were considered to have testified cumulatively in support of the testimony of Mr. Bossert (R., 141), and there was no evidence of probative value to contradict the testimony submitted by the plaintiff that the manual was impractical and never was enforced; and the only use made of it was for the information which was contained therein. In fact, dispatcher Prante testified that he never saw the book, let alone use it. (R., 150, 151.)

Since the manual was not adhered to and not enforced, it was the same as if never written and was used solely for the purpose of the information which it contained; not as a directive. For the reasons heretofore stated, it was useless as a directive to the truckmen.

The following cases hold such directives do not affect the independent contractor relationship.

Griff Williams v. U. S., 126 Fed. (2d), 129;
Radio City Music Hall Corp. v. U. S., 135 Fed. (2d), 715;
Standard Oil Co. v. Glenn, 52 F. Supp., 755, aff'd 148 F. (2d), 51;
U. S. v. Davis, 154 F. (2d), 314 (U. S. Ct. of App., D. C., 1946).

The manual has no place in this case. It cannot establish the basis of taxation necessary in this case. The basis of taxation is wholly lacking in this case, control or no control. To set aside the company's contracts with its truckmen and to renegotiate such contracts, in order to establish a wage basis upon which the percentages mentioned in the statute can be applied, is legislating. This is what the collector did. Certainly the court will not sustain such attempt at legislating. It is his job to enforce the statutes as they stand; not to rewrite them. That job can safely be left to Congress, whose members are elected by the people.

Whether this court can construe the manual irrespective of the District Court's judgment and findings is immaterial, since the District Court sustained us on the point that the manual was never effective or enforced; consequently further consideration of that point drops from the case.

This finding of the District Court was fully approved by the Circuit Court of Appeals. (R., 257.)

HISTORY OF THE ACT DISPELS ANY CONSTRUCTION THAT PLAINTIFF IS TAXABLE WITH RESPECT TO ANY PART OF THE PAYMENTS MADE TO ITS INDEPENDENT CONTRACTORS; OR WITH RESPECT TO THE WAGES PAID BY THE INDEPENDENT CONTRACTORS TO THEIR HELPERS WHOM THE HIRED, PAID AND FIRED.

Counsel for the Government argues that the independent contractors and the helpers whom they engaged for a limited period of time for the purpose of assisting in loading and unloading the household goods, are within the class of persons intended to be included in the Social Security Act. The assertion gets counsel for the Government no place unless they can show that Congress did, in fact, include them within the confines of the act. Counsel are in error in that contention as displayed by the history of the acts to which we now turn.

The Federal Social Security Act, which became effective August 14, 1935, was passed to achieve a program of social security by cooperation between the federal Congress and the several state Legislatures. The committee on economic security appointed by the President to make recommendations, made report on January 15, 1935, in which it recommended encouragement of "stabilization of employment" by the states and outlining a program which "will permit social and industrial stability." (See Report to the President dated January 15, 1935.)

As this court later said:

> "That act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency (unemployment) problem; and it found a method by which the state and the federal government could 'work together to a common end.'"

See:

Steward Machine Co. v. Davis, 301 U. S., 588, 81 L. Ed., 1291;

Buckstaff Bathhouse Co. v. McKinley, 308 U. S., 358, 84 L. Ed., 322.

In the last cited case the court says:

> "* * * Under the coordinated field which the act visualizes, when Congress brought within its scope various classes of **employers**, it in practical effect invited the states to tax the **same classes**. * * *" (84 L. Ed., 326.)

With this purpose in mind, it cannot be denied that the act was, of necessity, applicable only to employers having the power to hire and discharge their own employees, to determine their hours of labor, their conditions of work, which employers could undertake adequate steps to stabilize employment. In this case, the independent contractors alone have those powers over the men whom they hired, controlled, paid and fired. Therefore, the independent contractors must be treated as the employers of their assistants, if the purpose of the act, "stabilization of employment," is to be effectuated.

Said Bratton, C. J., in **Jones v. Goodson**, 121 F. (2d), 176:

> "The tax imposed on an employer is denominated an excise tax, and it has been judicially determined

and sustained as such a tax levied upon the privilege of establishing and maintaining the relationship of employer and employee. **Steward Machine Co. v. Davis**, 301 U. S., 548; **Helvering v. Davis**, 301 U. S., 619. **The tax is confined to cases where that relationship exists. It does not extend to instances where persons performing services are independent contractors."**

Congress, in 1939, had before it for consideration a change of this basis of taxation. It was considering a bill to extend the application of the acts to certain other relationships than employer-employee. The attempt was debated in Congress during the summer of 1939 and an amendment was adopted in the House which included:

> "* * * any individual, who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (but who is not an employee of such person under the law of master and servant) unless * * *." (See Report of Rep. Doughton of Committee on Ways and Means, dated June 2, 1939, to accompany H. R. 6635, pp. 109-10.)

In the Senate, the finance committee struck out the proposed amendment, saying:

> "Definitions of employee and employer—The House proposal to extend coverage to salesmen who are not employees has been stricken out by the committee. It is believed inexpedient to change the existing law **which limits coverage to employees.** * * *" (Report of Senator King for the committee dated July 7, 1939, to accompany H. R. 6635, p. 75.)

The conference committee sustained the Senate saying:

> "Amendments Nos. 97 and 98—The House bill extended coverage to certain salesmen **who are not employees** * * *. It is believed inexpedient to change the existing law **which limits coverage to employees**. The House recedes." (Conference Report of Rep. Doughton, dated August 4, 1939, to accompany H. R. 6635, p. 14.)

As said in the opinion of Mr. Justice Cardozo, in **Norwegian Nitrogen Products Co. v. U. S.**, 288 U. S., 294, 77 L. Ed., 796:

> "The history of the statute as it passed through the two houses of the Congress supplies confirmatory evidence." (Op., 77 L. Ed., p. 802.)

The history immediately referred to supplies confirmatory evidence that the employer-employee relationship, as known at the common law, was to be taxed with regard to **employment** on a **percentage** of the **wage** paid. Since no **wage** was paid in the case, the case ends with the determination of that fact. (See Findings of Facts Par. 25, R., 227.)

NO REASONS SHOWN WHY THIS CASE SHOULD BE ORDERED CERTIFIED UNDER SECTION 38, RULE 5 (B).

There are no conflicting decisions of the Circuit Court of Appeals and the many decisions rendered to date have followed a substantially unanimous trend. Nor are there any questions involved in this case, as decided by the lower courts, with which the instant decision is in conflict. Nor has the Circuit Court of Appeals of the Seventh Circuit so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

Without quoting at length therefrom, but holding in line with the point involved, are the following decided cases by the several courts referred to.

LIST OF APPLICABLE DECIDED CASES.

Transportation Cases:

The following cases involving transportation, most of which are by common carriers, are in support of the plaintiff.

United States v. Rosenbloom Truck Lines, 315 U. S., 50, 86 Law Ed., 671 (1942);

Thompson v. United States, 321 U. S., 19, 88 Law Ed., 513;

United States v. Mutual Trucking Co., 141 F. (2d), 655 (C. C. A. 6, 1944), affirming 51 F. Supp., 114;

Midwest Haulers, Inc., v. Brady, 128 F. (2d), 496 (C. C. A. 6, 1942);

Magruder v. Yellow Cab Co., 141 F. (2d), 324 (decided 1944, C. C. A. 4), affirming 49 F. Supp., 605;

United States v. Davis, 154 F. (2d), 314 (U. S. Ct. of Appeals, Dist. Columbia, 1946);

Commercial Motor Freight, Inc., v. Ebright, 143 O. S., 127, 54 N. E. (2d), 297, 151 A. L. R., 1321.

Compare:

Columbia River Packers' Assoc. v. Hinton, 315 U. S., 143, 86 L. Ed., 750.

Decisions by Circuit Court of Appeals Involving Unemployment and Social Security and Similar Acts:

United States v. Mutual Trucking Co., 141 F. (2d), 655 (C. C. A. 6, 1944), affirming 51 F. Supp., 114;

United States v. Davis, 154 F. (2d), 314 (U. S. Ct. of Appeals, Dist. Columbia, 1946);

McGowan v. Lazeroff, 148 F. (2d), 512 (C. C. A. 2, 1945), affirming D. C. of N. Y.;

Glenn v. Standard Oil Co., 148 F. (2d), 51 (C. C. A. 6, 1945), affirming 52 F. Supp., 755;

Spillson v. Smith, 147 F. (2d), 737 (C. C. A. 7, 1945), affirming D. C. of N. Y.;

Glenn v. Beard, 141 F. (2d), 376 (C. C. A. 6, 1944), cert. denied 323 U. S., 724;

Magruder v. Yellow Cab Co., 141 F. (2d), 324 (C. C. A. 4, 1944), affirming 49 F. Supp., 605;

Ridge Country Club v. United States, 135 F. (2d), 718 (C. C. A. 7, 1943);

Fahs, Coll., v. Orange State Oil Co., 138 F. (2d), 743 (C. C. A. 5, 1943), affirming 52 F. Supp., 509 (1942);

American Oil Co. v. Fly, Coll., 135 F. (2d), 491 (C. C. A. 5, 1943, reversing D. C. of Miss.);

Radio City Music Hall Corp. v. United States, 135 F. (2d), 715 (C. C. A. 2, 1943), affirming 50 F. Supp., 328, on summary judgment;
Anglim, Coll., v. Empire Star Mines Co., Ltd., 129 F. (2d), 914 (C. C. A. 9, 1942);
Midwest Haulers, Inc., v. Brady, 128 F. (2d), 496 (C. C. A. 6, 1942);
Williams v. United States, 126 F. (2d), 129 (C. C. A. 7, 1942) reversing 38 F. Supp., 536 (certiorari denied 317 U. S., 655);
Indian Refining Company, et al., v. Dallman, Coll., 119 F. (2d), 417 (C. C. A. 7, 1941), affirming 31 F. Supp., 455;
Government Personnel Automobile Assoc. v. United States, 124 F. (2d), 99 (C. C. A. 5, 1941);
Texas Company v. Higgins, 118 F. (2d), 636 (C. C. A. 2, 1941), affirming 32 F. Supp., 428.

Decisions by District Courts Involving Unemployment and Social Security and Similar Acts:

Nebraska National Hotel Co. v. O'Malley, 63 F. Supp., 26 (D. C. Neb., 1945);
Emard v. Squire, Coll., 58 F. Supp., 281 (W. D. of Wash., 1945), citing Columbia River Co. v. Hinton, 315 U. S., 143;
Gulf Oil Corp. v. U. S. A., 57 F. Supp., 376 (W. D. of Pa., 1944);
Hirsch v. Rothensies, 56 F. Supp., 92 (E. D. of Pa., 1944);
Brown & Sons Lumber Co. v. U. S., 55 F. Supp., 103 (W. D. of Ky., 1944);
Los Angeles Athletic Club v. U. S., 54 F. Supp., 702 (S. D. of Calif., 1944), appeal dismissed, 144 F. (2d), 352;
Standard Oil Company v. Glenn, Coll., 52 F. Supp., 755 (W. D. Ky., 1943), affirmed 148 F. (2d), 51;
The Spirella Company v. McGowan, Coll., 52 F. Supp., 302 (W. D. N. Y., 1943);

Yellow Cab Company v. Magruder, 49 F. Supp., 605 (D. C. of Maryland, 1943), affirmed 141 F. (2d), 342;

Biltgen v. Reynolds, Coll., 58 F. Supp., 909 (D. C. of Minn., 1943);

Bufruss v. Early, Coll., 44 F. Supp., 21 (W. D. of Va., 1943);

Orange State Oil Co. v. Fahs (D. C. Fla., 1942), 52 F. Supp., 509, affirmed (C. C. A. 5), 138 F. (2d), 743;

In the Matter of the Ten Eyck Company, 41 Supp., 375 (N. D. N. Y., 1941);

Kentucky Cottage Industries, Inc., v. Glenn, Coll., 39 F. Supp., 642 (W. D. of Ky., 1941), appeal dismissed.

Decisions Under State Unemployment Acts:

We are supported by the following cases arising under various state unemployment compensation acts:

Ozark Minerals Co. v. Murphy, Director, 51 N. E. (2d), 197, 348 Ill., 94;

Schatz, Pollack Woolen Co., Inc., v. Murphy, 51 N. E. (2d), 147, 348 Ill., 218;

Crossett Lumber Co. v. McCain, Comm., 170 S. W. (2d), 64 (Sup. Ct. of Ark., 1943), and 174 S. W. (2d), 174 (1943);

Southern Kraft Corp. v. McCain, 171 S. W. (2d), 947 (Sup. Ct. of Ark., 1943);

Texas Co. v. Wheeless, 185 Miss., 799, 187 So., 880;

Rochester Dairy Co. v. Christgau, 14 N. W. (2d), 780 (Sup. Ct. Minn., 1944).

We have included in the foregoing list no cases in which Congress or the General Assembly of any state has, by definition, defined "employment" or "employee" other than it was defined at common law; as illustrated by the decision in **Walling v. American Needlecrafts**, 139

F. (2d), 60 (6 C. C. A., 1943) and **National Labor Relations Board v. Hearst Publications**, 322 U. S., 111. And, as to state unemployment compensation laws, where the "three tests" provisions were adopted, as found in the cases cited in the **Hearst** case, pages 121, 122.

We submit that there is no occasion to certify this case to this court for settlement of propositions of law which have already been settled; and in the record of which case there exists no question to be settled except the application of the Social Security and Unemployment Acts to persons who have been established to be independent contractors and as to whom no employment relationship exists and no wages have been paid upon which to assess the percentage of tax specified in those acts.

REGULATIONS OF TREASURY DEPARTMENT.

Regulations of the Treasury Department are printed by the Government in Appendix, p. 16 et seq. They have no application whatsoever to the case presented by the record.

Judge Learned Hand in **Radio City Music Hall Corp. v. U. S.**, 135 F. (2d), 715 (1943), said:

> "We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an 'employee' and an 'independent contractor'; it is really no more than a gloss upon the definition contained in Justice Gray's opinion in Singer Manufacturing Co. v. Rahn, 132 U. S., 518, 523. We assumed its conclusiveness in Texas Company v. Higgins, supra, 638 (118 Fed. (2), 636), and so have the Tenth Circuit (Jones v. Goodson, 121 Fed. (2), 176, 179), and the Seventh (Williams v. United States, 126 Fed. (2), 129, 132)." (Op., p. 717.)

Said Judge Hand in **Texas Co. v. Higgins**, 118 F. (2d), 636 (C. C. A. 2, 1941):

> "A persuasive reason for this conclusion, at least in the case at bar, is that Congress could scarcely have meant a man doing a business like Thomas's to enjoy the benefit of unemployment allowances; and if he was not an 'employee' his four assistants were not; the servant of a servant may be the master's servant, but the servant of an 'independent contractor' is not. **United Gas Improvement Co. v. Larson**, 182 Fed. Rep., 620 (C. C. A. 3)." (Op., p. 638.)

Again, from the same case, Judge Hand said:

> "Were the question presented to us for the first time, we should have no doubt that Thomas and his assistants were not 'employees' of the plaintiff; **the act appears to take over the term as the common law knew it**, and at common law they would not be employees. The regulation is in harmony with this assumption, for it enumerates the generally accredited determinants in such cases, of which the most important is the putative employer's control over the employee's business * * *." (Op., p. 638.)

As shown by the record (R., 218), following the decision of the case of **Mutual Trucking Co. v. U. S.**, 141 F. (2d), 655, on April 17, 1944, the Commissioner of Internal Revenue, by mimeograph dated July 22, 1944, reversed his previous decisions under which this line of cases had arisen and accepted the holding in **Mutual Trucking Co. v. U. S.**, as dispositive of these questions. So far as now appears, the instant case is the only one pending involving such transportation contracts; but

many have been disposed of in accordance with the decisions of the District Court and the Circuit Court of Appeals.

There is no occasion to order a writ of certiorari.

Respectfully submitted,

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